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NO. 868

In the Supreme Court of the United States

October Term, 1959

DARRELL BARRON,

Petitioner

vs.

THE STATE OF OHIO

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio, entered in the above entitled cause on the twentieth day of January, 1960.

CITATIONS TO OPINION BELOW

The opinion of the Supreme Court of Ohio, five judges concurring in the judgment only and two judges dissenting, is printed in the Appendix B hereto, infra, p.p. 14 and is reported in 170 O.S. 267.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on the 20th day of January, 1960. Timely application for rehearing was filed and on the 10th day of February, 1960 was denied.

STATEMENT OF THE CASE

The petitioner, Darrell Barron, was indicted on June 28, 1958 on a charge of Second Degree Murder by the Lucas County Grand Jury for purposely and maliciously killing one Robert Sanders.

On July 8, 1958, the petitioner appeared for arraignment and asked for a continuance of two weeks for further pleading.

On July 22, 1958, the petitioner appeared in Court, and through his counsel, entered a plea of not guilty and the cause was set for trial on September 9, 1958 by the Trial Court.

This cause came to trial by jury on September 9, 1958.

The cause was submitted to the jury on September 12, 1958 and the jury returned the following verdict: "Not guilty as charged in the indictment but guilty of Manslaughter in the First Degree."

On September 15, 1958, the petitioner filed his Motion for a New Trial and said Motion was overruled on September 22, 1958.

On October 20, 1958, the petitioner was sentenced to be confined in the Ohio Penitentiary for violation of Section 2901.06 of the Revised Code until released ac-

cording to law and ordered to pay the costs of prosecution.

On this same date, the petitioner filed his Notice of Appeal on questions of law.

This cause came on for hearing on appeal and on February 13, 1959, the Court of Appeals for the Sixth District of Ohio, all judges thereof concurring, reversed the judgment of the trial court for the reason that said court committed error prejudicial to the petitioner by its refusal to include in its general charge to the jury the substance of petitioner's Special Requests to Charge Numbers Five (5), Six (6), and Seven (7) and remanded the case for a new trial. (Appendix A hereto, infra. p.p. 13)

On June 3, 1959 the Supreme Court allowed the State's motion for leave to appeal.

On January 20, 1960, The Supreme Court of Ohio, all judges concurring in the syllabus but two dissenting from the judgment reversed the judgment of the Court of Appeals, and affirmed that of the trial court, the Court of Common Pleas. (Appendix B hereto, infra. p.p. 14).

On February 10, 1960, the Supreme Court of Ohio denied petitioner's application for rehearing.

FACTS

The petitioner owned and operated a tavern known as the "Loma Linda" which is located on the Chicago Pike about one-half mile east of the new Toledo Airport (R.199); adjacent to it is a housetrailer in which the petitioner, his wife and three small children resided. (R.198).

The tavern was patronized largely by negroes, whites, Mexicans and Puerto Ricans residing in the general neighborhood.

On the late evening of June the 16th, 1958, a gang

of five young negroes entered, among them Robert and David Sanders. Immediately they create a continuing disturbance and are requested to leave by the petitioner. (R.202, 203, 204).

The disturbance grew to such proportions to cause the petitioner to summon a constable. (R.204).

Upon the constable's arrival, the petitioner requested David Sander's arrest. (R.207). Immediately the gang sets up a howl of protest, questions the officer's authority, defy him to arrest them, hurl dirty and foul invectives upon him, swing on him and threaten him and finally say "We've got a gun out in the car and we will get it and blow your head off." (R.207, 208, 209, 247, 168).

As the tempo of the melee reaches this height, and while the officer is still endeavoring to effect an arrest, the petitioner went to the drawer and got his pistol and endeavored by this display of arms to quiet the tempest. But to the contrary, one of the gang turns on the petitioner and says, "A gun ain't nothing. We will get our gun and blow your head off and shoot this whole place up." (R.247).

The petitioner seeing the need for more help asks that additional help be summoned and one of the patrons calls the Sheriff's Department for help. (R.210).

Meanwhile, one of the gang slips outside and arranges the escape of his cohorts through the rear door (R.211). Two of the gang, who had gone outside prior to the Constable's arrival, park their car headed toward the road ready for the escape. (R.212).

While the constable and the petitioner await the Sheriff's Deputies, the threats of violence by the hoodlums are repeated, suddenly two of the gang rush for the back door and the escape arranged for them, meanwhile the constable exits through the front door. (R.-211, 212). As the petitioner moves outside, he sees two of the gang vault the fence and take up positions behind their confederate's car, he orders them "hold it

right there," but these members of the gang, to carry out their avowed intent to do harm to petitioner and Constable Zwyer, open the door of the car to get a gun and crouch along side the car in readiness to carry out the threat. (R.213, 169).

With his life in danger and mindful of the peril of Constable Zwyer, petitioner fires his pistol to the rear of the car intending to frighten his assailants and pin them behind the car until the Sheriff's men can arrive. (R.214). At no time does his intent vary or change. At all times his sole and only intent is to keep these assailants where they will inflict no harm on him, his family, his patrons or the peace officer as they have viciously, violently, and repeatedly threatened to do. (R.214).

At this juncture, with the Constable approaching from the front of the building with gun drawn, with one of the gang possessed of a gun in readiness to shoot, and with the petitioner with his pistol at the rear of the building, one of the gang is struck but moves down along the highway and dies. (R.135, 136).

CONSTITUTIONAL QUESTION

Did the refusal to incorporate the substance of petitioner's Special Requests Number Five (5), Six (6) and Seven (7) in the general charge to the jury violate the rights guaranteed to the petitioner by the Fourteenth Amendment of the Constitution of the United States ?

HOW FEDERAL QUESTIONS PRESENTED

Petitioner made timely exception to the refusal of the trial court to charge as requested on the grounds that the substantial rights of the petitioner were prejudiced by such order; raised the identical question of prejudicial error on motion for new trial , which was denied; again, raised the identical question on Appeal to the Court of Appeals, where the claim of prejudicial error was sustained; and finally defended the questions of prejudicial error in the Supreme Court of Ohio, wherein the Court of Appeals was reversed and the trial court affirmed.

ARGUMENT

The statutes of Ohio direct trial courts to charge the jury. The Ohio Revised Code, Section 2945.10 provides:

> "(G) The court, after the argument is concluded and before proceeding with other business, shall forthwith charge the jury."

The Ohio Revised Code, Section 2945.11 further provides:

> "In charging the jury, the court must state to it all matters of law necessary for the information of the jury in giving its verdict . . . "

The statutes of Ohio likewise safeguard an accused against any irregularity in the proceedings of the Court. The Ohio Revised Code, Section 2945.79 provides:

> "A new trial, after a verdict of conviction, may be granted on the application of the defendant for any of the following causes affecting materially his substantial rights:
>
> (A) Irregularity in the proceedings of the court, jury, prosecuting attorney, or the witnesses for the state, or for any order of the court, or abuse of discretion by which the defendant was prevented from having a fair trial;"

The statutory provision for Special Instructions before argument is Revised Code, Section 2945.10, which reads as follows:

> "The trial of an issue upon an indictment or information shall proceed before the trial court or jury as follows:
>
> (E) When the evidence is concluded, either party may request instructions to the jury on the points of law, which instructions shall be reduced to writing if either party requests it."

The decisions of the Supreme Court of Ohio have frequently construed the above section. In Grossweiler v. State, 113 O.S. 46, the Supreme Court of Ohio held:

> "2. Under the statute, it is not mandatory upon the court to give any instructions to the jury in a criminal case before argument, but a request made by defendant's attorney for a proper instruction before argument may not be ignored in the general charges even though the request has not been repeated."

In Curtis v. State, 113 O.S. 187, the Ohio Supreme Court held to the same effect, quoting earlier pronouncements of that court to the same effect, as follows:

> "All of the foregoing requests were presented to the court in writing before argument, but, under the well known principles declared in Wertenberger v. State, 99 Ohio St. 353, 124 N.E. 243, they were not required to be given at that time, though it was the duty of the court to incorporate the substance of those requests, if sound, in the general charge."

Likewise, in the instant case, State v. Barron, 170 O.S. 267, the Supreme Court of Ohio held:

> "Under Section 2945.10 (E), Revised Code, it is not mandatory upon a trial court to give any instructions to the jury in a criminal case before argument, but, if requested special instructions, reduced to writing, are correct, pertinent and timely presented, they must be included, at least in substance, in the general charge."

Incidentally, it should be noted that all the judges of the Supreme Court concurred in the "syllabus" but that two of the seven "dissented from the judgement" reversing the three judges of the Court of Appeals.

In the instant case, the Supreme Court of Ohio, in the fourth to last paragraph of its opinion, states:

> "The special instructions requested and which were refused were not relevant, and therefore, the trial court was not chargeable with error in declining to recognize them and incorporate them in the general charge."

It appears, therefore, that the court says they were properly excluded because they are not relevant or pertinent. No question is raised as to their correctness or soundness.

The Petitioner's Special Requests to charge were presented to the trial court in writing before argument in accordance with the statute, Revised Code Section 2945.10 (E) quoted above (R.268). The complete text of these requesets are contained in the Opinion of the Supreme Court of Ohio. (Appendix B, infra. p.p. 14).

The substance of Special Requests Five (5) and Six (6) are the statutes therein stated. The substance of Special Request Number Seven (7) is the innkeeper's common law duty, which is spelled out in Ohio Jurisprudence 2nd, Volume 29, Inns and Restaurants, Section 19, citing Cunningham v. Marable, 76 N.E. 2d. 739, decided by the Court of Appeals of Wayne County and denied certification to the Supreme Court of Ohio, and states:

> "The general rule, applicable to innkeepers, is that whenever a possessor of land holds it out to the public for purposes of his business, he will be subject to liability to those members of the public who are upon his land for such purpose when they are injured by the accidental, negligent, or intentionally harmful acts of third persons, if the possessor, by the exercise of reasonable care, could have (a) discovered that such acts were being done or were about to be done, and (b) protected the members of the public by controlling the conduct of the third persons, or giving a warning adequate to enable them to avoid the harm."

We submit that the soundness of the substance of the charges cannot and, indeed, was not questioned.

The record clearly establishes that the requested charges are pertinent to the evidence. This is a murder case. Intent, malice, motive, and all the conduct of the petitioner was under scrutiny. It is sufficient, however, to consider the law of manslaughter, since that is the conviction which now stands in this case.

Voluntary manslaughter is defined as follows:

> "Voluntary manslaughter has been defined as the lawful and intentional killing of another while the one who commits the crime is under the influence of a sudden passion or heat of blood produced by an adequate and reasonable provocation before a reasonable time has elapsed for the blood to cool and for reason to

assume its habitual control."

The above is quoted from 27 O. Jur. 2d Homicide, Sec. 30, citing State v. Carter, 75 O. App. 545, State v. Laswell 78 O. App. 202; Zeltner v. State, 13 O.C.C. N.S. 417; and State v. Mueller 6 O.L. R. 542.

It should be noted that the prime element here is "intentional killing."

> Involuntary manslaughter is defined as:
> " . . . the unlawful and intentional killing of a human being while the slayer is in the commission of an unlawful act. The unlawful act, though, must be one that is made unlawful by statute and not merely one that is a violation of a municipal ordinance or one that was unlawful at common law." 27 O. Jur. 2d. Homicide, Section 32.

Here we note that the killing must be "unintentional" but "while the slayer is in the commission of an unlawful act."

The commission of an unlawful act was one of the issues of fact that the State had to prove beyond a reasonable doubt for the jury to return a verdict of involuntary manslaughter. The essential purpose of petitioner's special instruction Numbed Five (5) was to establish that the conduct of the petitioner in quelling the riot in his tavern was not unlawful.

It is the function of the Court's charge to guide the jury in its application of the law to the facts. Morris v. United States, 156 F2d 528, annotated at length in 169 A.L.R. 305.

The Trial Court at page 283 of the record, charged the jury as follows:

> "Manslaughter may be either voluntary or involuntary. Involuntary manslaughter is the unlawful and unintentional killing of a human being, such death directly resulting from the slayer's committing an unlawful act. The committing of the unlawful act must have been a proximate cause of the death."

The Court then went on to define voluntary manslaughter.

The Court then says:

> "If you find from the evidence beyond a reasonable doubt that the deceased was so killed by this defendant, then he would be guilty of manslaughter, and you should return your verdict accordingly."

There is no definition of "unlawful act". The only qualification recited is that it must have been a proximate cause of the death.

Again at page 284 of the Record, in the Charge of Self-defense, the Court says:

> 'First: The defendant must be free from fault; that is he must not have provoked the difficulty or purposely brought on the combat."

We submit that the jury may have found that petitioner's efforts to quell the rioting and to remove the gang from his place of business, were matters of "fault" with the petitioner which summarily removed "self-defense" from the consideration of the jury.

The petitioner is entitled to have his rights and duties spelled out to the end that there can be no misinterpretation of his lawful course of conduct and where an accused is under a specific mandate as spelled out in the Revied Code 4399.16 quoted above. he is entitled to have such duty brought to the attention of the jury so that there can be no doubt as to the propriety of his actions in attempting to quell the disturbance. Lynn v. People (S.C.) 170 Ill. 527, 48 N.E. 964. Patton v. State 86 S.W. 2d 741.

The aim and purpose of instructions Numbers Six (6) and Seven (7) was to remove any doubt in the minds of the jury as to the lawfulness of the requests, demands and attempts to remove said deceased and his co-conspirators from the petitioner's property.

It is probable that the jury, in considering whether or not the petitioner had committed an unlawful act, found, in the absence of proper instructions, that his actions in attempting to quell the disturbance, in ordering the departure of the gang or in the endeavor to protect his patrons, was an unlawful act.

We submit that petitioner's special requests Numbers Five (5), Six (6) and Seven (7) were correct statements of the law, pertinent to the evidence adduced, and that the trial court committed prejudicial error by its failure to incorporate the substance of the same in its general charge.

We submit further that the finding of the Supreme Court of Ohio to the effect that the requested charges were not relevant is based on an erroneus finding of fact.

We direct the Court's attention to the statement of fact contained in the first paragraph of the Supreme Court's Opinion. The statement is accurate down to and including the point at which the Court makes this statement:

> "The disorder continued with threats of violence, and assistance from the Sheriff's Office was asked by telephone."

Then the Court departs from the facts as follows:

> "The disturbing group then left the tavern, whereupon the defendant procured a pistol and began firing it on the outside of the tavern."

The last quoted segment of the statement of facts is a complete departure from the true facts as developed by the record. State's witness, Leon Brown, (R. 22) states: "Darrell (the petitioner) went to get his gun and told me to sit down." The context of the testimony shows that this event occurred long before the members of the gang departed.

To the same effect, State's witness, David Sanders, testified R. 127 et seq.). See also the testimony of Kenneth Roth. (R. 161). Indeed, every witness, both the State's and the petitioner's, testified that the petitioner took his gun from the drawer prior to the time the threats of violence were made. It was not procured after the gang had left the tavern, as the Supreme Court's Opinion states.

Of what did these threats of violence consist? "We will get our gun and blow your head off and shoot this place up." (R. 247,

R. 139, R. 140, R. 168). All the witnesses, both State's and petitioner's, except the members of the gang, testified to similar threats of violence.

This, then, is the scene. The petitioner has procured his weapon in an effort to quell the disturbance. The threats of violence, consisting of references to a weapon outside in the car which these men proposed to get and in order to do harm to the petitioner, the constable and the "whole place" are made. At this juncture, the gang breaks up for the outside. And for what purpose? To get the weapon and do the harm they threatened, is the only reasonable explanation. This is the melee. This is the "res gestae". The break to the outide cannot be separated from the threats of violence. And it is on this set of circumstances, with his life imperiled, with the officer and patrons likewise imperiled, that the petitioner undertook to follow the members of the gang and prevent their return to the tavern with the weapon they professed to have.

The foregoing facts do not warrant the conclusion of the Ohio Supreme Court, as follows:

> "Here, we are of the opinion that, since the shooting occurred outside the tavern at a time when neither the defendant nor his patrons were in any imminent danger of bodily harm, the special instructions . . . . were not relevant."

CONCLUSION

We respectfully submit that a Writ of Certiorari should be granted for the reason that the Trial Court committed error prejudicial to the rights of the petitioner by its failure to incorporate the substance of the Special Requests to Charge in its general charge to the jury in the following respects:

(1) Denied Petitioner the right to have his lawful course of conduct identified for the jury.
(2) Denied to Petitioner a fair trial.
(3) Denied to Petitioner the right to have "unlawful act" fully and adequately defined.
(4) Denied to Petitioner the right to have the jury fully consider Petitioner's claim of self defense.

Respectfully submitted,

James D. Nestroff
Richard B. McQuade,

Attorneys for Petitioner

APPENDIX A

JUDGMENT ENTRY OF THE COURT OF APPEALS OF LUCAS COUNTY, OHIO

This cause came on to be heard upon the appeal on questions of law, the assignments of error, the bill of exceptions, the original papers and pleadings, the transcript of the docket and journal entries in the court of common pleas, and the briefs and arguments of counsel; upon consideration whereof, the judgment in the court of common pleas is reversed, for the reason that said court committed error prejudicial to the defendant-appellant by its refusal to include in its general charge to the jury the substance of defendant-appellant's Special Requests to Charge Numbers Five (5), Six (6) and Seven (7) and this cause is remanded to said court of common pleas for a new trial.

It is therefore considered that said defendant-appellant recover of said plaintiff-appellee his costs herein and all court costs incurred to secure this judgment of reversal, including the costs of the bill of exceptions and the transcript.

It is further ordered that a special mandate be sent to the court of common pleas to carry this judgment into execution.

Plaintiff-Appellee's exceptions noted.

/s/ Lehr Fess
Presiding Judge.

Approved:
/s/ Jos. J. Jan, Assistant Attorney
for State of Ohio, Plaintiff-Appellee.
/s/ R. B. McQuade, Attorney for
Defendant-Appellant, Darrell Barron.

APPENDIX B

OPINION

of the

SUPREME COURT OF OHIO

ZIMMERMAN, J. The bill of exceptions discloses that defendant owned and operated a tavern in Lucas County on the "Chicago Pike" about a half mile east of the new Toledo airport. This tavern was patronized largely by Negroes, Mexicans and Puerto Ricans residing in the general neighborhood. Late on the night of June 16, 1958, a group of five young Negroes entered the tavern, Robert and David Sanders among them, created a continuing disturbance and were requested to leave. Such disturbance was of sufficient proportions to cause the defendant to call a constable. Upon the constable's arrival, the defendant requested him to arrest David Sanders. The disorder continued with threat of violence, and assistance from the sheriff's office was asked by telephone. The disturbing group then left the tavern, whereupon defendant procured a pistol and began firing it on the outside of the tavern. One of the bullets struck Robert Sanders in the back and killed him when he was proceeding hurriedly in the general direction where his automobile was parked.

During the trial, at the conclusion of the evidence and before argument, counsel for defendant submitted to the court in writing eight special instructions with the request that they be given to the jury. Special instructions Nos. 1,2 and 8 were incorporated in the general charge and had to do with second degree murder, degrees of proof and the manner in which oral statements attributed to a defendant should be regarded. The court declined to give special insructions Nos. 3,4,5,6, and 7 as presented and did not incorporate the substance of Nos. 5,6, and 7 in the general charge. The special instructions which were refused dealt with definitions of unlawful acts, the right of a person without a warrant to make an arrest, the duty of a tavern keeper with respect to conduct on his premises, tres-

pass and the duty of a tavern keeper to protect his patrons.

The three special instructions, the substance of which the Court of Appeals held should have been given, are as follows:

"Special Instruction Number 5. Section 4399.16 of the Revised Code of Ohio provides, as follows: 'No tavern keeper shall permit rioting, reveling, intoxication or drunkenness in his house or on his premises.

"If you find from the evidence that the defendant, Darrell Barron, is a tavern keeper; that Robert Sanders and other persons acting in concert with him were rioting or reveling, while on the defendant's Darrell Barron, premises, then the court charges you as a matter of law, that the defendant, Darrell Barron, had a mandatory duty, imposed upon him by the law of this state, to attempt to quell or supress said rioting or reveling.

"Special Instruction Number 6. Section 2909.21 of the Revised Code of Ohio provides as follows: 'No person shall enter without lawful authority upon the land or premises of another, or being upon the land or premises of another, upon being notified to depart therefrom by the owner or occupant, or the guest or servant of either, without lawful authority neglect or refuse to depart therefrom.'

"If you find the fact to be that Robert Sanders and other persons in his company entered the place of business of the defendant, Darrell Barron, and that while in said place of business caused a disturbance and were obnoxious or disorderly and that the defendant, Darrell Barron, repeatedly requested said Robert Sanders and those other persons in his company to leave said place of business and that Robert Sanders and those other persons in his company refused to leave and continued to conduct themselves in the same disturbing, obnoxious and disorderly manner, if you should find the fact to be, I say, as a matter of law, that Robert Sanders and those other persons in his

company were trespassers and were committing a continuing trespass as long as they remained in said place of business.

"Special Instruction Number 7. If you find from the evidence that the defendant, Darrell Barron, is the possessor of premises which are held out to the public for the purpose of his business; that Robert Sanders and other persons acting in concert with him were conducting themselves in a disorderly and disturbing manner while on said premises and that the defendant, Darrell Barron, believed or had reason to believe that personal injuries to his guests and patrons were likely to result from the said conduct of Robert Sanders and those other persons acting in concert with him, then the court charges you, as a matter of law, that the defendant, Darrell Barron, had a mandatory duty, imposed upon him by the law, to control the said conduct of said Robert Sanders and those other persons acting in concert with him."

Section 2945.10 (E), Revised Code, relating to criminal procedure, recites:

"When the evidence is concluded, either party may request instructions to the jury on the points of law, which instructions shall be reduced to writing if either party requests it."

Under similar statutory provisions this court has held that it is not mandatory upon the court to give any instructions to the jury in a criminal case before argument, but that, if requested instructions are correct and pertinent, they must be included, at least in substance, in the general charge. Wertenberger v. State, 99 Ohio St., 353, 124 N.E., 243; and Grossweiler v. State, 113 Ohio St., 46, 148 N.E., 89.

Here, we are of the opinion that, since the shooting occurred outside the tavern at a time when neither the defendant nor his patrons were in any imminent danger of bodily harm, the special instructions requested and which were refused were not relevant, and, therefore, the trial court was not chargeable with

error in declining to recognize them and incorporate them in the general charge. Moreover, the trial court gave a complete and comprehensive charge embracing all the elements appropriate to the case.

At the conclusion of the general charge, the court asked counsel whether there was anything further. The response of the defendant, through his counsel, was "No, your honor." This was some indication, at least, that the general charge as given was satisfactory, and that the defendant was no longer insisting that the substance of the special instructions be added.

This cause presents a matter for the determination of a jury, and no error intervened prejudicial to the rights of the defendant.

The judgment of the Court of Appeals is reversed, and that of the Court of Common Pleas affirmed.

Judgment reversed.

WEYGANDT, C.J., TAFT, BELL and PECK, J.J., concur.

MATTHIAS and HERBERT, J.J., concur in the syllabus but dissent from the judgment.